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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 874

C. K. WALL,

Petitioner,

vs.

MRS. MATTIE BRIM

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GROVER MIDDLEBROOKS,
CLIFFORD E. HAY,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Comes now C. K. Wall, and prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit to review here the record and judgment entered by that court on the 14th day of November, 1944 in the case of *C. K. Wall, Appellant* v. *Mattie Brim, Appellee,* No. 10,939, reported in 145 F. (2d) 492.

Summary Statement of the Matter Involved

On October 16, 1941, respondent, Mrs. Mattie Brim, alleging diversity of citizenship, sued petitioner, C. K. Wall, a physician, in the United States District Court at Thomasville, Georgia, for damages caused by his alleged negligence in removing a cyst from her neck on June 12, 1940, in Thomasville, Georgia (R. 2).

On November 19, 1941, plaintiff in trial court (respondent here) amended by alleging that her facial nerve was injured in the operation so as to produce a facial paralysis, and that defendant (petitioner here) was negligent in his diagnosis (R. 3). Defendant denied negligence and alleged that any injury was unavoidable.

In June, 1943, while plaintiff's complaint alleged only a cause of action based on negligence, and after a claim based on battery or trespass had become barred by the statute of limitations, a verdict was returned for plaintiff (respondent here) but the Fifth Circuit Court of Appeals on October 20, 1943, reversed the judgment because no negligence was shown,[1] and held that though not specifically presented by the pleadings and apparently not submitted to the jury, the record, in the light of Rule 15(b) [2] authorizing the amendment of pleadings to conform to the evidence definitely presented another issue which should have been developed before, and submitted to, the jury. This was whether defendant (petitioner here) did not breach the obligation which as a surgeon he owed plaintiff when, after making the

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[1] *Wall* v. *Brim*, 138 F. 2d 478.

[2] Rule 15(b) of Federal Rules of Civil Procedure, 28 U.S.C.A. following Sec. 723(c), reads:

"Rule 15(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

incision and ascertaining that the operation would not be the absolutely simple one he had secured plaintiff's consent to perform, but a serious and difficult one fraught with possible, if not probable, dangers, he went ahead without making full disclosure of the difficulties attending, and the possible danger of, the operation and securing her consent to go forward under the new found conditions. That court held that an operation without the patient's consent, express or implied, is a technical battery or trespass for which the operator is liable.

The case was remanded for trial anew with full right to the parties to amend their pleadings and to offer new and additional evidence as they are advised.

At the next and last trial on November 16, 1943, which was also after a claim based on battery or trespass had become barred by the statute of limitations, plaintiff (respondent here) by amendment alleged that defendant (petitioner here) failed to obtain her consent for the operation and that such failure was a battery or trespass (R. 5). Your petitioner objected to and filed his motion to dismiss the amendment because it set out a different cause of action from the one originally sued on, in that the original is based on malpractice of a physician as defined by Georgia Code Section 84-924,[3] and the cause of action set out in the amendment is based on assault and battery as authorized by Georgia Code Section 105-601,[4] and the latter cause of action

[3] Code 1933, Sec. 84-924 reads:

"*Malpractice of surgery and medicine.*—A person professing to practice surgery or the administering of medicine for compensation must bring to the exercise of his profession a reasonable degree of care and skill. Any injury resulting from a want of such care and skill shall be a tort for which a recovery may be had."

[4] Code 1933, Sec. 105-601 reads:

"*Right of action; Intention.*—A physical injury done to another shall give a right of action, whatever may be the intention of the actor, unless he shall be justified under some rule of law. The intention shall be considered in the assessment of damages."

is barred by the Georgia Statute of Limitations set out in Georgia Code Section 3-1004[5] (R. 6).

The trial court overruled the motion to dismiss the amendment, and directed the jury to return a verdict for defendant (petitioner here) on the original cause of action based on negligence or malpractice and submitted to the jury only the new cause of action based on battery or trespass set out in the amendment filed November 16, 1943 (R. 146). The jury returned a verdict for plaintiff (respondent here) for $12,000.00. On appeal the Circuit Court of Appeals for the Fifth Circuit on November 14, 1944, affirmed the judgment of the trial court and held that the claim on which recovery was based did not constitute a new cause of action, and that under Rule 15(c)[6] the amendment filed November 16, 1943 related back to the original complaint (R. 188). Your petitioner's motion for rehearing was denied by the said Circuit Court of Appeals on December 15, 1944 (R. 197).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. Section 347). The following cases are believed to sustain the jurisdiction: *Sartor et al.* v. *Arkansas Nat. Gas Corp.*, 321 U. S. 620; *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. 661; *Freeman* v. *Bee Machine Company*, 319 U. S. 448.

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[5] Code 1933, Sec. 3-1004 provides:

"*Injuries to the person.*—Actions for injuries to the person shall be brought within two years after the right of action accrues. * * *"

[6] Rule 15(c) of Federal Rules of Civil Procedure, 28 U.S.C.A. following Sec. 723(c), reads:

"Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

Questions Presented

1. Whether Rule 15(b) or Rule 15(c) of Federal Rules of Civil Procedure authorizes a plaintiff to amend a complaint setting out a claim or cause of action based on negligence or malpractice of a physician in performing an operation, by setting out a claim based on battery or trespass (in that the operation was performed without the plaintiff's consent) after the expiration of the time fixed by a state statute of limitations for bringing an action based on battery or trespass.

2. Whether an amendment setting out a claim based on battery or trespass in that a physician operated upon a plaintiff without the plaintiff's consent adds a new cause of action to an original complaint based on negligence or malpractice of the physician in performing the operation; and if so, whether such amendment was properly allowed under Rule 15(b) or Rule 15(c) of Federal Rules of Civil Procedure notwithstanding the fact that the amendment was not filed until after the expiration of the time fixed by a statute of limitations of the state where the cause of action arose and was tried, for bringing an action based on battery or trespass, and notwithstanding another statute of the state which provides that no amendment setting out a new cause of action shall be allowed.[7]

3. Whether the substantive right of a defendant to assert a defense based upon a state statute of limitations is abridged in violation of Sec. 1, 48 Stat. 1064 (28 U. S. C. A. Section

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[7] Code 1933, Sec. 81-1303 provides:

"No amendment adding a new and distinct cause of action * * * shall be allowed unless expressly provided for by law."

723b) [8] by a construction of Rule 15(b) or Rule 15(c) of Federal Rules of Civil Procedure which would authorize a plaintiff to amend a complaint setting out a cause of action based on negligence or malpractice of a physician in performing an operation by setting out a claim based on battery or trespass after the latter claim is barred by a state statute of limitations.

4. Whether the judgment of the Circuit Court of Appeals holding that a plaintiff's amendment setting out a claim based on battery or trespass in that the defendant, a physician, operated upon the plaintiff without the plaintiff's consent, does not add a new cause of action to an original complaint based only on the physician's negligence or malpractice in performing the operation, is in conflict with applicable decisions [9] of the court of last resort of the state in which the cause of action arose and in which the case was tried.

Reasons for Granting the Writ

This case presents new questions of importance concerning a construction of one of the Federal Rules of Civil Procedure which would deprive a litigant of the substantive right to assert in a tort action a defense based upon a state statute of limitations.

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[8] Sec. 1, 48 Stat. 1064 (28 U.S.C.A. Sec. 723b) provides:

"Rules in actions at law; Supreme Court authorized to make. The Supreme Court of the United States shall have the power to prescribe, by general rules, for the District Courts of the United States * * * the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

[9] *Perry* v. *Hodgson*, 168 Ga. 678, 148 S. E. 659; *Jeter* v. *Davis*, 33 Ga. App. 733, 127 S. E. 898; *City of Columbus* v. *Anglin*, 120 Ga. 785, 48 S. E. 318; *Strachan Shipping Co.* v. *Hazlip-Hood Cotton Co.*, 161 Ga. 480, 131 S. E. 283.

The decision of the United States Circuit Court of Appeals for the Fifth Circuit should be reversed because:

1. The United States Circuit Court of Appeals for the Fifth Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court, namely, the right of a plaintiff under Rule 15(b) or Rule 15(c) of Federal Rules of Civil Procedure to amend a complaint setting out a cause of action based on negligence or malpractice of a physician in operating upon the plaintiff, by setting out by amendment a claim based on battery or trespass (in that the operation was performed without the plaintiff's consent) after the expiration of the time fixed by a statute of limitations of the state where the cause of action arose and where the case was tried, for bringing an action based on battery or trespass.

2. The United States Circuit Court of Appeals for the Fifth Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court, namely, the question as to whether the power conferred upon this Court by Section 1, 48 Stat. 1064 (28 U. S. C. A. Section 723b) to prescribe rules would authorize this Court to prescribe a rule which would allow a plaintiff to amend a complaint setting out a cause of action based on negligence or malpractice of a physician in performing an operation, by setting out a claim based on battery or trespass after the latter claim is barred by a statute of limitations of the state in which the cause of action arose, and in which the case was tried.

3. The United States Circuit Court of Appeals for the Fifth Circuit has decided, and as we think erroneously, and in conflict with applicable decisions of the court of last resort of the state in which the cause of action arose and in which the case was tried (especially those of *Perry* v.

Hodgson, 168 Ga. 678, 148 S. E. 659; *Jeter* v. *Davis*, 33 Ga. App. 743, 127 S. E. 898; *City of Columbus* v. *Anglin*, 120 Ga. 785, 48 S. E. 318), the question as to whether a plaintiff's amendment setting out a claim based on battery or trespass in that the defendant, a physician, operated upon the plaintiff without the plaintiff's consent, adds a new cause of action to an original complaint based only on the physician's negligence or malpractice in performing the operation.

SUPPORTING BRIEF

On a former appeal the only cause of action set out in the complaint was one based on negligence or malpractice of petitioner here, who was the defendant in the trial court. On the former appeal, in reversing the judgment for the plaintiff (the respondent here) the United States Circuit Court of Appeals for the Fifth Circuit in October, 1943, held that no negligence was shown but that though not specifically presented by the pleadings and apparently not submitted to the jury, the record, in the light of Rule 15(b) authorizing the amendment of pleadings to conform to the evidence definitely presented another issue, that is whether defendant (petitioner here) did not operate upon the plaintiff without her consent, thereby committing a battery or trespass.[10] As we pointed out in our motion for rehearing, when the former trial was had on June 14, 1943, a claim based on battery or trespass had already become barred by the statute of limitations, and therefore we disagree with the finding of the Circuit Court of Appeals in its decision on the former appeal reported in 138 F. (2d) 478, that the evidence at the former trial presented an issue involving battery or trespass. The amendment filed November 16, 1943, set out a claim based on battery or trespass, but it, as did the evidence at the former trial, came too late—after a claim based on battery or trespass had become barred by the statute of limitations.

The Circuit Court of Appeals in its questioned decision said that if it could agree that the claim on which the verdict and judgment appealed from were based did present a new cause of action, it is quite clear that the introduction of that claim into the case long antedated the filing of the amended pleading (R. 190). While that claim did antedate

[10] *Wall* v. *Brim*, 138 F. 2d 478.

the filing of the amended pleading, it, as we have shown, antedated it by five months only, and was first introduced into the case by the introduction of evidence at the former trial in June, 1943, which was after the claim had become barred.

In delegating to this Court the power to prescribe general rules for the District Courts, Congress limited that power by providing that "said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant." [11]

In this connection see *United States* v. *Sherwood,* 312 U. S. 584, at page 589.

In *United States* v. *Oregon Lumber Company,* 260 U. S. 290, it was held at page 299:

> "The defense of the statute of limitations is not technical, but substantial and meritorious."

And in *Clementson* v. *Williamson,* 12 U. S. 72, at page 74 it was held:

> "The statute of limitations is entitled to the same respect with other statutes, and ought not to be explained away."

To the same effect see *United States* v. *Wilder,* 80 U. S. 254.

The Circuit Court of Appeals in its challenged decision discussed the case of *Barthel* v. *Stamm,* a case arising in Georgia, just decided, and reported in 145 F. (2d) 487, and said that what was said in that case has precise application here. We do not agree, for in that case the original

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[11] Sec. 1, 48 Stat. 1064 (28 U.S.C.A. Sec. 723b) provides:

"*Rules in actions at law; Supreme Court authorized to make.* The Supreme Court of the United States shall have the power to prescribe, by general rules, for the District Courts of the United States * * * the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

complaint was based upon an implied promise to repay money. It was an action for money had and received. As the Circuit Court of Appeals in the *Barthel* case pointed out, the amendment "in no wise abandoning the identity or character of the loan transactions first alleged, exhibited two writings, one relating to the first of the transactions and the other relating to the latter two transactions."

The court also said:

> "The Georgia limitation statutes control. We recognize the rules as established in Georgia and elsewhere that a new and distinct 'cause of action' introduced by amendment cannot succeed if barred at the time of the amendment, but that a bettering or amplification of the case *first sought* to be alleged will relate back to the filing of the suit (italics ours). The Rules of Civil Procedure have abandoned the term 'cause of action' and substituted 'claim', and they have abolished the old forms of action as separate measures of legal rights." [12]

The court held that under Rule 15(c) the amendment related back to the original pleading. We say that what was held in the *Barthel* case has no application here because while the amendment in that case may have amounted to a "bettering or amplification of the case first sought to be alleged", the amendment in the case at bar did not amplify the case first alleged but set out an entirely new and distinct cause of action or claim.

The court in the *Barthel* case pointed out that before the rules were formulated, this Court went far in holding that a suit for a personal injury brought by a railroad employee, which did not mention employment in interstate commerce but relied wholly on rights given by the state law, might be amended after the period of limitation into one alleging employment in interstate commerce and governed

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[12] *Barthel* v. *Stamm*, 145 F. 2d 487.

by the Federal Employer's Liability Act with materially different rights and liabilities, citing *New York Central R. R. Co.* v. *Kinney,* 260 U. S. 340.[13] In the *Kinney* case, which was on writ of certiorari to the Supreme Court of the State of New York, this Court held that the decisions of the higher courts of the State of New York warranted a recovery under the Federal statute or the common law or the statutes of New York. The Supreme Court of Georgia, however, has uniformly held that a complaint based on rights given by the state laws cannot be amended after the period of limitation into one alleging employment in interstate commerce and governed by the Federal Employers Liability Act. See *Central of Georgia R. Co.* v. *Jones,* 152 Ga. 92, 108 S. E. 618; *Central of Georgia R. Co.* v. *Jones,* 28 Ga. App. 258, 110 S. E. 914, certiorari denied, 260 U. S. 729; *Atlantic Coast Line R. R. Co.* v. *Kennedy,* 20 Ga. App. 238, 92 S. E. 973; *Charleston & Western Carolina Ry. Co.* v. *Miller,* 113 Ga. 15, 38 S. E. 338.

In *Union Pacific Ry. Co.* v. *Wyler,* 158 U. S. 285, it was held:

> "An amendment to a pleading which sets up a new and different cause of action does not relate back to the commencement of the suit, and such new cause of action is barred if the amendment is not made within the period fixed by the statute from the time it occurred."

In *Atkinson* v. *Fidelity & Casualty Company,* 187 Ga. 590 (3), 1 S. E. 2d 744, the Supreme Court of Georgia, in construing Georgia Code Section 3-1004 [14] expressly held that a cross-action, though arising out of the same transaction,

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[13] *Barthel* v. *Stamm,* 145 F. 2d 487.

[14] Code 1933, Sec. 3-1004 reads:

"Injuries to the person.—Actions for injuries to the person shall be brought within two years after the right of action accrues, except for injuries to the reputation, which shall be brought within one year."

cannot be set up by a defendant after his right of action has become barred by the statute of limitations. See also *City of Columbus* v. *Anglin*, 120 Ga. 785, 48 S. E. 318, and *Brown* v. *New York Life Insurance Company*, 32 F. Supp. 443 (D. C., N. J.).[14a]

In *Kansas Gas & Elec. Co.* v. *Evans*, 100 F. (2d) 549 (10 C. C. A.), certiorari denied, 306 U. S. 665, the court states that a fair test in determining whether an amended pleading introduces a new cause of action is whether the facts alleged could have been introduced under the former pleadings.

The same evidence will not support both complaints. Regardless of how much care and skill defendant used in the operation he would be liable under the claim for battery or trespass set out in the amendment if he operated on the plaintiff without her consent. On the other hand if he had her consent to operate but failed to use the legally required care and skill he would be liable to her under the original complaint.

The same measure of damages will not apply to each complaint. Under Georgia laws in a claim or action based

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[14a] In *Brown* v. *New York Life Insurance Co.*, 32 F. Supp. 443, the court said:

"It is a rule of law in the Federal Courts as well as the courts of New Jersey that an amendment will not be allowed if it introduces a new cause of action which as an independent proceeding would be barred by a statute of limitations. Taylor v. Anderson, 275 U. S. 431; Union Pacific Ry. v. Wyler, 158 U. S. 285; Sunlight Carbon Co. v. St. Louis & S. F. R. Co., 15 F. (2) 802; Frymier v. Mascola, 31 F. (2) 109; Comm'r. of Internal Revenue v. Rieck, 104 F. (2) 294; Rygiel v. Kanengieser, 114 N. J. L. 311; Macknowski v. Hudson R. R. Co., 121 N.J.L. 126; Myers v. Otz, 23 N.J.L. 215. And this rule has not been changed by Rule 15(c) of Federal Rules of Civil Procedure. * * * See Ronald Press v. Shea, 27 F. Supp. 857; Whitham Construction Co. v. Remer, 105 F. (2) 371."

on battery or trespass, "the intention shall be considered in the assessment of damages." [15]

The challenged decision holding that the amendment based upon battery or trespass does not set out a different cause of action or claim from one based on negligence or malpractice is contrary to decisions of the Supreme Court of Georgia. See *Perry* v. *Hodgson*, 168 Ga. 678, 148 S. E. 659, wherein it was held that a cause of action based upon the performance of an unauthorized operation is a different cause of action from a cause of action based upon malpractice or negligence. See also *Jeter* v. *Davis*, 33 Ga. App. 733, 127 S. E. 898, to the same effect.

Unless this Court grants a writ of certiorari, the decision of the United States Circuit Court of Appeals for the Fifth Circuit will have the effect of construing a Federal Rule of Civil Procedure so as to abridge substantive rights of litigants, contrary to the statute which gave this Court the power to prescribe rules for the district courts.

Conclusion

The petition for certiorari should be granted in order that this Court may review the decision of the United States Circuit Court of Appeals for the Fifth Circuit heretofore rendered in this case.

Respectfully submitted,

GROVER MIDDLEBROOKS,
CLIFFORD E. HAY,
Attorneys for C. K. Wall, Petitioner.

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[15] Code 1933, Sec. 105-601 reads:

"Right of action; intention.—A physical injury done to another shall give a right of action, whatever may be the intention of the actor, unless he shall be justified under some rule of law. The intention shall be considered in the assessment of damages."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 874

C. K. WALL,

Petitioner,

vs.

MRS. MATTIE BRIM

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT OPPOSING PETITION

JULIAN WEBB,
IRA CARLISLE,
A. B. CONGER,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES

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No. 874

C. K. WALL,

Petitioner,

vs.

MRS. MATTIE BRIM,

Respondent

OPPOSING BRIEF BY RESPONDENT

The petition for review on writ of certiorari presents for consideration and determination two questions: First, Do the facts, statutes and decisions referred to present an issue of which this court should take cognizance? Second, Did the Circuit Court of Appeals commit error that should be considered and corrected by this court? If the answer to the first question is in the negative, the latter will be eliminated.

Petitioner seeks to invoke the jurisdiction of this court under Section 240 of the Judicial Code, as amended, which he contends is sustained by the case of *Sartor, et al.*, v. *Arkansas Natural Gas Corporation,* 321 U. S. 260; *Mercoid Corporation* v. *Mid-Continent Company,* 320 U. S. 661, and *Freeman* v. *Bee Machine Company,* 319 U. S. 448. Petitioner in his "Reasons for Grant of the Writ" submits that this case presents questions of importance and should be settled by this court; that is, the right of parties to amend

under Rule 15(b) and Rule 15(c) of the Federal Rules of Civil Procedure. Petitioner further contends that the decision of the Circuit Court of Appeals is in conflict with applicable decisions of the court of last resort of the State of Georgia, and cites the cases of *Perry* v. *Hodgson,* 168 Ga. 678, *Jeter* v. *Davis,* 33 Ga. App. 743, and *City of Columbus* v. *Anglin,* 120 Ga. 785.

A perusal of the Supreme Court cases and of the cases of the Supreme Court and Court of Appeals of the State of Georgia shows that they do not bear out petitioner's contention that the issue presented in this case comes within the jurisdiction of this court.

In the case of *City of Columbus* v. *Anglin,* 120 Ga. 785, Chief Justice Simmons in a very lengthy and elucidating opinion discusses the Georgia statute, requiring the courts to repel an amendment that sets up a new cause of action. He states that in former decisions of the Supreme Court of Georgia he finds "an irreconcilable conflict in the decisions" on the question, and finally not only criticizes but overrules all former opinions in conflict with that decision. He states, "So long as a plaintiff pleads but one wrong he does not set up but one cause of action. * * * Different facts may be alleged, separately and cumulatively, to show the same wrong, and the number and variety of the facts alleged will not make the case more than one cause of action so long as but one wrong is shown. A single wrong will not be made plural by alleging that it is made up of a number of constituent parts. He then states that a number of tests have been suggested for determining whether an amendment adds a new cause of action, that is, "whether the proposed amendment is a different matter, another subject of controversy, or the same matter more fully or differently laid to meet the possible scope and varying phases of the testimony." Another test he suggests is "whether the original petition and the amendment would be subject to the same

plea; whether the same evidence would support both; whether the same measure of damages is applicable to both; whether both could have been pleaded cumulatively in the same count; whether an adjudication upon one would bar a suit under the other." He further states, "If there is substantial identity of wrong (which necessarily includes identity of the right violated), there is substantial identity of cause of action. * * * So long as the facts added by the amendment, however different they may be from those alleged in the original petition, show substantially the same wrong in respect to the same transaction, the amendment is not objectionable as adding a new and distinct cause of action."

The Supreme Court of the State of Georgia in the case of *Perry* v. *Hodgson*, cited and relied upon by petitioner for jurisdictional grounds, in the first headnote says:

> "Where a surgeon enters into an agreement with a person merely to perform a certain operation, and the surgeon in violation of the contract goes further, without an emergency, and performs another operation, which is unauthorized by the agreement, or by an emergency necessitating the additional operation, and injury results to the patient, the surgeon cannot relieve himself from liability by showing skill and care in the other operation."

These cases from the court of last resort of the State of Georgia, instead of aiding the jurisdictional grounds, seem to negative that right.

The case was first tried on the theory that the petitioner did not bring to the exercise of his profession a reasonable degree of care and skill. The Circuit Court of Appeals reversed that trial because of the lack of professional or expert evidence to support the issue of negligence upon which the verdict and judgment were based. The Circuit Court of Appeals in its decision stated that the evidence

definitely presented another issue, and that is, whether the operation was performed without the patient's consent, and that that issue had not been submitted to the jury, and remanded the cause with direction that the parties be permitted to "amend their pleadings and to offer new and additional evidence as they are advised." The plaintiff, at the trial term, did offer an amendment setting forth that when the doctor discovered the seriousness of the operation he did not obtain the patient's consent before proceeding. The issue presented to and decided by the Circuit Court of Appeals was whether this amendment set up a new cause of action and was therefore barred by the Georgia statute of limitation. Georgia Civil Code (1933), Section 81-1301, provides:

> "All parties, whether plaintiffs or defendants, in the superior or other courts, whether at law or in equity, may at any stage of the cause, as matter of right, amend their pleadings in all respects, whether in matter of form or of substance."

Rule 15(b) provides:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be tried in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment."

Rule 15(c) provides:

> "Whenever the claim or defense asserted in the amended pleadings arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings the amendment relates back to the date of the original pleadings."

These rules, promulgated by the Supreme Court of the United States pursuant to authority conferred upon that

court by law (28 U. S. C. A., Section 723(b)), must mean something, and if they do, they provide for and take care of issues identical with the one presented. The claim asserted in the amendment "arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings." It was the same doctor, the same patient, the same occasion, the same operation and the same result. These rules, having been promulgated by the Supreme Court under authority of the law, have the same force and effect of a statute. If there is a variance or an apparent conflict between the Georgia statutes and the rules promulgated by the Supreme Court, the latter must prevail.

> "Where there is a Federal Statute on a subject of practice, that is paramount to State statutes."
> *Hill* v. *Walker*, 214 U. S. 517.

> "A substantive right or defense under Federal Employers' Liability Act, April 22, 1908, cannot be lessened by a local rule of practice."
> *Norfolk Southern R. Co.* v. *Ferrebee*, 238 U. S. 269.

In Simpkin's Federal Practice, Section 353, under the heading "Relating Back To Amendments," it is stated:

> "The new civil procedure rule on this subject makes it plain that the doctrine of relating back, so as to cut off the intervening statute of limitation, shall apply whenever the claim or defense asserted in the amended pleadings arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings. Even though the amended pleadings appear to set forth a new claim or defense arising out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings, the doctrine of relating back applies and an intervening statute of limitation cannot prevail. It is only where the claim or defense asserted in the amended pleadings does not arise out of the conduct, transaction,

> or occurrence set forth or attempted to be set forth in the original pleadings that an intervening statute of limitation will be held to be effective."

In the case of *New York Central* v. *Kinney*, 260 U. S. 340, Judge Holmes in delivering the opinion, in headnote 2, said:

> "An amendment of a complaint by a railroad employee seeking damages against the railroad for personal injuries, by alleging that the parties were engaged in interstate commerce at the time of the injury does not introduce a new cause of action, and therefore may be made, although the limitation period has elapsed since the injury occurred."

See, also, to the same effect *Missouri, Kansas & Topeka Ry. Co.* v. *Wulf*, 226 U. S. 570.

> "The rule in the Federal Courts as to 'relation back' is exceedingly liberal."
> *Hammond-Knowlton* v. *U. S.*, 121 Fed. (2d) 192.

In the case of *Blair* v. *Durham*, 134 Fed. (2d) 729, the court said:

> "An amendment to complaint does not set up a new cause of action so long as the cause of action alleged grows out of the same transaction and is basically the same or is identical in essential elements on which right to sue is based and upon which defendant's duty to perform is alleged to have arisen."

The fact that the doctor failed to obtain the consent of the patient after he discovered the operation to be much more serious and fraught with much more danger than he anticipated and so advise his patient appeared in each trial of the case, and was always a part of the case. It was upon this theory that the Circuit Court of Appeals called attention to the fact (*Wall* v. *Brim*, 138 Fed. (2d) 478) that the evidence definitely presented that issue which might have

been submitted to the jury, and in remanding the case gave direction that the plaintiff be permitted to "amend their pleadings and to offer new and additional evidence as they are advised."

Respondent respectfully submits, first, that under the facts and the law of the case the Supreme Court of the United States is without jurisdiction and should not take cognizance of the matter; and, secondly, that if this cause comes within the jurisdiction of this court, the Circuit Court of Appeals was correct in holding that the amendment did not set forth a new cause of action and was, therefore, not barred by the Georgia statute of limitation.

Respectfully submitted,

JULIAN WEBB,
IRA CARLISLE,
A. B. CONGER,
Attorneys for Mrs. Mattie Brim,
Respondent.

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